

1986

# Amica Mutual Insurance v. Carl F. Schettler : Reply Brief

Utah Supreme Court

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BRIEF

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DOCKET NO. **860621-CA**  
IN THE SUPREME COURT OF THE STATE OF UTAH

AMICA MUTUAL INSURANCE COMPANY, :

Plaintiff-Respondent, :

-v- :

CARL F. SCHETTLER, :

Defendant-Appellant. :

**88-0032-CA**

----- :

CARL F. SCHETTLER, :

Third-Party Plaintiff  
and Appellant, :

Case No. 860621

(Category No. 13(b))

-v- :

JAMES M. BLACK and BARBARA J.  
BLACK dba BLACK, NICHOLS &  
GUIVER; R. LAMAR GUIVER; and  
NATIONAL AUTOMOBILE THEFT  
BUREAU, :

Third-Party Defendants  
and Respondents. :

REPLY BRIEF OF APPELLANT

Appeal from the Judgment of the  
Third Judicial District Court in and for  
Salt Lake County, State of Utah,  
the Honorable Richard H. Moffat, presiding.

**FILED**  
NOV 20 1987

Clerk, Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

---

AMICA MUTUAL INSURANCE COMPANY, :

Plaintiff-Respondent, :

-v- :

CARL F. SCHETTLER, :

Defendant-Appellant. :

----- :

CARL F. SCHETTLER, :

Third-Party Plaintiff  
and Appellant, :

-v- :

JAMES M. BLACK and BARBARA J.  
BLACK dba BLACK, NICHOLS &  
GUIVER; R. LaMAR GUIVER; and  
NATIONAL AUTOMOBILE THEFT  
BUREAU, :

Third-Party Defendants  
and Respondents. :

Case No. 860621

(Category No. 13(b))

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REPLY BRIEF OF APPELLANT

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Appeal from the Judgment of the  
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## POINT I

SUMMARY JUDGMENT AND ORDER STRIKING APPELLANT'S AFFIDAVITS DATED OCTOBER 31, 1986, WERE IN FACT INTERLOCUTORY IN CHARACTER.

Rule 56(c), Utah Rules of Civil Procedure provides:

...a summary judgment, interlocutory in character, may be rendered on the issue of liability alone, although there is a genuine issue as to the amount of damages. (Emphasis added.)

Consistent with Rule 56(c), this court, on its own motion for lack of finality, dismissed appellant's appeal from denial of his motion for summary judgment dated December 31, 1986.

(Addendum, Case No. 870045.)

Therefore, this appeal should be included within the very last appeal which has been filed in this court's Case No. 870342 from the final act, judgments, and orders of the lower court.

Also, this appeal should be consolidated with all appeals being transferred to the Utah Court of Appeals.

## POINT II

THE LOWER COURT FAILED TO FILE FINDINGS OF FACTS SUPPORTING SUMMARY JUDGMENT AND ORDER STRIKING APPELLANT'S AFFIDAVITS DATED OCTOBER 31, 1986.

Although Respondent AMICA stated in argument by Mr. Morgan that AMICA was not asking in its motion for summary judgment on its complaint (T. 108, August 19, 1986.), the lower court merely granted summary judgments without any other designation and struck appellant's affidavits without any stated reasons and

without any findings of facts in either matter.

AMICA filed its motion for summary judgment as to appellant's counterclaim only. (T. 111, August 19, 1986.)

Although the lower court's Memorandum Decision dated September 30, 1986, granted Respondent AMICA's motion for summary judgment dismissing appellant Schettler's counterclaim, the lower court's Summary Judgment and Order merely granted summary judgments in favor of all respondents and struck appellant's affidavits and expressly stated:

The Motion of AMICA Mutual Insurance Company to Strike Defendant and Third-Party Plaintiff's Pleadings as sanctions is reserved for ruling at a later time. (Emphasis added.) (Addendum, October 31, 1986, Civil No. C85-2687.)

Schettler's "Pleadings" included his counterclaim, i.e., all pleadings. Confusion is present because of the documents mentioned above.

Therefore, without findings of facts or further explanation as to what was intended by the lower court's October 31, 1986, decision, this matter should be remanded to the lower court with instructions to file findings of facts. With such remand, the interlocutory summary judgment and the striking of appellant's affidavits should become a part of the final appeal which has been filed in this court's Case No. 870342.

#### POINT III

THE LOWER COURT PROVIDED NO EVIDENTIARY HEARING BEFORE SUMMARY JUDGMENT AND ORDER STRIKING APPELLANT'S AFFIDAVITS DATED OCTOBER 31, 1986.



Mr. Flint for Appellant Schettler anticipated an evidentiary hearing would be needed ultimately relative to both motions, i.e., for summary judgment and to strike pleadings. (T. 154, lns. 22-24, August 19, 1986.)

Mr. Heath for Respondent AMICA, relative to its motion to strike the pleadings, contended that an evidentiary hearing would not be necessary. (T. 157, lns. 17, 18.)

Interestingly, Mr. Morgan for Respondent AMICA, relative to its motion for summary judgment, made no mention of any evidentiary hearing.

It is well settled that refusal of an evidentiary hearing relative to striking an answer and rendering a default judgment against the defendant because he is in civil contempt is an unconstitutional denial of due process. (Duell v. Duell, 178 F.2d 683; Hammond Packing v. State of Arkansas, 212 U.S. 322; Hovey v. Elliott, 167 U.S. 409.)

Also, see: Dorsey v. Academy Moving and Storage, Inc., 423 F.2d 858; Societe International v. Rogers, 357 U.S. 197, citing Cf. Tol v. United States, 319 U.S. 463, together with Hammond and Hovey, supra.)

The same rationale should apply to granting summary judgments without a hearing.

In Societe, supra, at 213, the United States Supreme Court stated:

But these problems go to the adequacy of petitioner's proof and should not on the record preclude petitioner from

being able to contest on the merits.

...dismissal of the complaint with  
prejudice was not justified.

Summary judgment prevents the appellant from having  
his day in court to be heard afforded him by due process.

Without findings, there is no way this court can deter-  
mine whether or not the summary judgments and striking appellant's  
affidavits were for sanctions or for undisputed facts.

Therefore, this appeal should be remanded to the lower  
court with instructions to file findings of facts. With such  
remand, the interlocutory summary judgments and striking appellant's  
affidavits will become a part of the final appeal which has been  
filed in this court's Case No. 870342.

#### POINT IV

DISPUTED FACTS EXISTED TO PREVENT  
SUMMARY JUDGMENT DATED OCTOBER 31,  
1986.

Without findings of facts being filed by the lower  
court, there are no reasons stated for his granting AMICA's motion  
for summary judgment.

If summary judgment was granted because of no disputed  
facts existed because appellant's affidavits were stricken, then  
we must look to Rule 56(c), Utah Rules of Civil Procedure, which  
states:

(c) Motions and proceedings thereon.  
The motion shall be served at least  
10 days before the time fixed for the  
hearing. The adverse party prior to  
the day of hearing may serve opposing

affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages. (Emphasis added.)

Aside for a moment, if summary judgment was in fact granted because of sanctions, it should be noted that an order punishing for civil contempt is interlocutory and reviewable upon appeal taken for subsequent final judgment. (Duell, *supra*, at 687, 688 [8] and cases cited therein. Also, see Contempt, Key 66(2), 72.)

This is another reason for the need of remand for findings, because in either case, i.e., summary judgment because of sanctions or undisputed facts, the summary judgments and the striking of appellant's affidavits were interlocutory and to be part of the final judgment appeal.

This was, in effect, the holding of this court in this very appeal, this court's Case No. 860621, wherein the court stated:

Respondent's Motion to Dismiss Appeal is denied without prejudice to the issues raised therein being addressed in the following appeal from the final judgment. (Addendum, Dated August 11, 1987.)

By implication, the same should be afforded Mr. Schettler.

It is recognized, as stated in AMICA's Memorandum in Opposition to Defendant's Motion for Summary Judgment in the lower court:

It is well established in this jurisdiction that summary judgment may be granted only if it is shown that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law under those facts. Singleton v. Alexander, 19 Utah 2d 292, 431 P.2d 127 (1967). In considering a motion for summary judgment, a court is under a duty to view all of the evidence, admissions, and inferences most favorable to the party opposing the motion. Bihlaier v. Carson, 603 P.2d 790 (Utah 1970). Finally, a court considering a motion for summary judgment must not engage in a weighing of the evidence or in judging of the credibility of the witnesses or affiants in determining whether there is a reasonable probability that the party moved against could, in fact, prevail at trial. Sandberg v. Klein, 576 P.2d 1291 (Utah 1978).

Also, see Spor v. Crested Butte Silver Mining, Inc., 60 Utah Adv. Rep. 27, \_\_\_\_\_ P.2d \_\_\_\_\_, decided June 25, 1987; and Anderson et al v. Libberty Lobby, Inc., et al., 46 CCH S.Ct. Bull. P., B3503, Supreme Court of the United States, decided June 25, 1986.

Although the lower court made no findings relative to undisputed material facts, the record is saturated with alleged disputed facts. Only one on each claim is required for denial of summary judgment.

AMICA admits in its Memorandum in Opposition to Mr. Schettler's Motion for Summary Judgment that there is at least one material fact in dispute, i.e., whether the taking of Mr. Schettler's vehicle was a "theft" or an authorized repossession.

#### Theft

AMICA claims that there was no theft but that the vehicle was repossessed by Pioneer Dodge. (Record at 715-7 and 1174.)

Mr. Schettler contends that there was a theft. (Record at 715-75.) Also, see Mr. Schoenfeld's deposition p. 75, lns. 2-16, where he testified that he did not notify the police of his intent to repossess the vehicle, nor did he notify the police after taking the vehicle, contrary to standard industry practice.

Mr. Schoenfeld stated therein:

Carl stoled (sic) it from me and I  
stoled (sic) it back and I wanted  
to pretend it never left.

See, also, Schoenfeld's deposition, p. 76, lns. 6 through p. 77, ln. 16; p. 78, lns. 16 through p. 78, ln. 19, where he testified that he hid the vehicle in either one of the garages at Pioneer Dodge or someplace off the lot so that Mr. Schettler could not come and take the car back again. He testified he hid the car for the purpose of pretending that the vehicle had never left the lot so that he could attempt to secure a mechanic's lien

A wrongful taking or disappearance of a vehicle is tantamount to theft under the law and under the policy of insurance. (Clark Equipment Co. v. Hartford Accident and Indemnity Co.,

608 P.2d 903 (Kansas 1980).)

A policy covering theft or larceny covers a wrongful taking of an automobile regardless of whether the taking is accomplished through trespass or fraud. (Mann v. State Farm Mutual Automobile Insurance Co., 698 P.2d 925 (Oklahoma 1985).)

Furthermore, this court has held that the meaning of theft within an insurance policy in Utah should be liberally construed to mean the taking without authority of the property of another. (P.E. Ashton Co. v. Joyner, 17 Utah 2d 162, 165; 406 P.2d 306, 308 (1965).) See, also, Kilpatrick v. Motors Insurance Corp., 561 P.2d 472 (New Mexico 1977).)

Also, AMICA admits that "theft not required for coverage in our policy." (Deposition of Ronald Rosenthal, p. 45, lns. 12 through p. 51, ln. 4.)

The taking of the vehicle under any of the admitted circumstances was without good faith on the part of Mr. Schoenfeld and constituted theft.

The disputed facts relative to theft are of the most significance because AMICA's complaint is for fraud, alleging Mr. Schettler's vehicle was not stolen. All causes of action are premised on theft or no theft.

#### Statement of Disputed Facts

<u>Allegation</u>	:	<u>Factual Dispute</u>
1. No influence or attempts to influence investigation of	:	1. Deposition of Rosenthal, exhibits:

<u>Allegation #1 cont'd.</u>	:	<u>Factual Dispute #1, cont'd.</u>
Sheriff's office.	:	<u>#52</u> , dated March 14, 1983, Black
Affidavit of Detective	:	is working with the Salt Lake
Mortenson states that no one	:	City detectives, district attorney
tried to influence or pressure	:	and with the NATB representative.
him in the criminal investiga-	:	"Hopefully all this will result
tion of Schettler.	:	in the return of our payment."
Schettler disputes.	:	Signed by Rosenthal
	:	<u>#53</u> , dated March 24, 1983, Black
	:	states <u>he and Detective Mortenson</u>
	:	have decided Schettler knew the
	:	car was at Pioneer when reported
	:	stolen and also states that Carl
	:	Schettler's auto dealer license
	:	would be revoked.
	:	<u>#57</u> , dated August 19, 1983, Black
	:	indicates he has contacted NATB's
	:	Ellery Summer, and Detective
	:	Mortenson of Sheriff's office
	:	who told Black that he, Mortenson,
	:	"felt there was a very little
	:	chance to get a conviction on
	:	Schettler, but after further
	:	conference with him he has agreed
	:	to go on and review additional

Allegation # 1 cont'd. : Factual Dispute #1 cont'd.  
: information we obtained from  
: Schoenfeld. He will then present  
: it to the Salt Lake County  
: Prosecutor."  
: #58, dated October 12, 1982,  
: Guiver admits to meeting with  
: Mortenson and Deputy County  
: Attorney Neal Gunnarson and urging  
: prosecution, and states that  
: Gunnarson would prosecute (con-  
: trary to what Gunnarson says in  
: his deposition at page 10).  
: #64, dated March 5, 1984, Guiver  
: states he is calling the Sheriff's  
: office twice a week urging them  
: "to get this claim off dead center"  
: #65, dated March 26, 1984, Rosen-  
: thal asks Guiver to get the local  
: NATB representative to "assist  
: you in getting the County Attorney's  
: Office moving on this case.  
: #66, dated April 2, 1984, Guiver  
: states that if Detective Mortenson  
: does not get his action filed



Allegation #1, cont'd. : Factual Dispute #1, cont'd.  
: against Schettler by April 5,  
: 1984, that "we will go directly  
: to the County Attorney's Office  
: and see what we can do."  
: #67, dated April 30, 1984,  
: Guiver says that Ellery Summer's  
: of NATB has also "been after  
: Mr. Mortenson, but with the same  
: results as we have had," and  
: states that he and Summer's will  
: contact "the Sgt. in charge of  
: auto theft and see if something  
: can be worked out."  
: #68, dated June 8, 1984, Guiver  
: states, "We have finally been  
: able to get this matter off dead  
: center. I met this morning with  
: Detective Mortenson and Attorney  
: Ernie Jones of Criminal Division,  
: Salt Lake County Attorney's  
: Office. Mr. Jones agreed to issue  
: a warrent (sic) for the arrest  
: of Schettler.

<u>Allegation</u>	:	<u>Factual Dispute</u>
2. No influence of attempts to influence the role of the prosecutors.	:	2. See previous discussion and contents of exhibits 52, 57, 58, 65, 66, 68 of Deposition of
Affidavits of Ernest Jones and Neal Gunnarson state that criminal proceedings against Schettler were made solely by the County Attorney's Office.	:	Ronald Rosenthal. See also, <u>Deposition of Neal Gunnarson</u> : p. 10, states that he referred the Schettler criminal investigation back to the Sheriff's Office for further investigation and did not agree to file charges ( <u>contra</u> Guiver's letter of October 12, 1982.)
Schettler disputes.	:	pp. 12-14, states that the police officer who brings a case to him for screening comes alone to present the case and brings statements from witnesses; that less than five percent of screenings have any complaining witnesses present and it is very rare p. 19, states does not recall if he declined case or not.
	:	pp. 30-31, states does not know who keeps declination forms or where filed.

Allegation #2, contd. : Factual Dispute #2, cont'd.  
: Deposition of Ernest Jones:  
: pp. 13-14, states that Guiver  
: was at the screening, and contrary  
: to what Gunnarson stated, that it  
: would not be unusual for witnesses  
: to attend screening.  
: pp. 26-28, states that the  
: criminal case against Schettler  
: was based on the fact that  
: Schettler never told his insurer,  
: AMICA, that the car was at  
: Pioneer Dodge.  
: p. 29, indicates that Schettler  
: should be prosecuted because he  
: failed to pay Pioneer Dodge for  
: repair work.  
: Deposition of LaMar Guiver and  
: Exhibit 2; admits attending  
: screenings.  
: p. 33, states that Guiver and the  
: insurance company "were more than  
: willing to provide us with any  
: documents that we needed as part  
: of the insurance fraud case."

Allegation #2, cont'd. : Factual Dispute #2, cont'd.  
: p. 34, admits that counsel for  
: plaintiff drew up his affidavit  
: and he signed it after having  
: been subpoenaed to testify by  
: Schettler's counsel, but before  
: testifying.

The above disputed facts are but some of many. However, for emphasis, permit us to be redundant: (1) only one disputed material fact is sufficient to deny granting summary judgment; and (2) summary judgments are interlocutory in character.

Therefore, this court should reverse and remand with instructions for filing findings of facts and having the interlocutory summary judgments and the striking of Mr. Schettler's affidavits included in the last appeal filed after final judgment of the lower court. (This court's Case No. 870342.)

#### SUMMARY OF ARGUMENT

The lower court's Memorandum Decision dated September 30, 1986, disclosed the lower court's intent at that time was to dismiss appellant's counterclaim. However, within the last paragraph of that Memorandum Decision, the lower court stated:

Counsel for the prevailing parties  
are to prepare the appropriate Orders  
in accordance with the Local Rules  
of Practice. (Emphasis added.)

The Order, dated October 31, 1986, (Case No. C-85-2687, Addendum) which was prepared by Respondent AMICA's counsel, stated:

The Motion of AMICA Mutual Insurance Company to Strike Defendant and Third-Party Plaintiff's Pleadings as Sanctions is hereby reserved for ruling at a later time.

The Summary Judgment, dated October 31, 1986 (Case No. C-85-2687, Addendum) involved all respondents, but as it relates to Respondent AMICA, it was prepared by Respondent AMICA's counsel and stated:

It Is Hereby Ordered, Adjudged, and Decreed that the Motion for Summary Judgment of plaintiff and third-party defendant AMICA Mutual Insurance Company is hereby granted.

For reasons unknown to present counsel, because Mr. Flint was then counsel for appellant relative to that matter, the Summary Judgment itself merely granted summary judgment, without any mention of appellant's counterclaim.

It is assumed without accusation that within the approximate one month's time between the Memorandum Decision and the formal Summary Judgment, Messrs. Morgan and Flint discussed and agreed upon the wording of the formal Summary Judgment.

Appellant argues that the wording of an instrument should be interpreted strictly as written by its author.

It would seem that there should be an explainable reason why the counterclaim was not included within the formal Summary Judgment dated October 31, 1986.

Findings of facts would be of considerable assistance in dispelling the present confusion.

Finally, an evidentiary hearing, and not merely arguments and memoranda, should have been afforded before any findings of facts could be made.

#### CONCLUSION

Summary judgment because of sanctions requires a hearing and is interlocutory in character.

Summary judgment may not be granted if there is a genuine dispute of material fact.

Rule 56(c) provides that affidavits may be filed. They are not mandatory. The contended disputed facts may be determined from depositions, etc., or at an evidentiary hearing. There were depositions in this matter, but there was no evidentiary hearing.

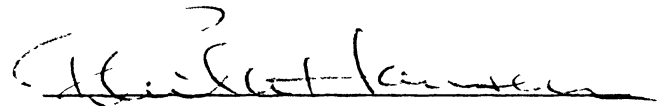
As stated in this court's ruling of August 11, 1987, issues raised in this appeal may be included in the following appeal from final judgment in the entire case.

Therefore, the lower court's granting of summary judgments and the striking of Mr. Schettler's affidavits should be reversed and remanded to the lower court with instructions of inclusion within the final judgment of the lower court.

#### REQUEST FOR ORAL ARGUMENT

Oral argument is hereby requested under Category No. 13(b).

Respectfully submitted this 20<sup>th</sup> day of November, 1987.



PHIL L. HANSEN  
Attorney for Defendant and  
Third Party Plaintiff-  
Appellant, Carl F. Schettler

CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of November,  
1987, four (4) copies of the foregoing Reply Brief of Appellant  
were served on each of the following:

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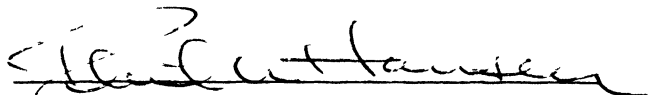
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## ADDENDUM



APR 17 1987

SUPREME COURT OF UTAH

STATE OF UTAH

SALT LAKE CITY, UTAH

April 16, 1987

OFFICE OF THE CLERK

---

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9 Exchange Place  
Salt Lake City, UT 84111

Amica Mutual Insurance  
Plaintiff and Respondent,

v.

No 870045

Carl F. Schettler,  
Defendant and Appellant.

THIS DAY, the above case is dismissed on the Court's own  
motion for lack of finality.

Geoffrey J Butler, Clerk

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

-----

AMICA MUTUAL INSURANCE	:	MEMORANDUM DECISION
COMPANY,	:	
	:	CIVIL NO. C-85-2687
Plaintiff,	:	
	:	
vs.	:	
	:	
CARL F. SCHETTLER,	:	
	:	
Defendant and Third	:	
Party Plaintiff,	:	
	:	
vs.	:	
	:	
JAMES M. BLACK and BARBARA	:	
BLACK, dba BLACK, NICHOLS,	:	
& GUIVER, et al.,	:	
	:	
Third Party Defendants.	:	

-----

The Court finds as follows:

1. Amica's Motion for Summary Judgment dismissing the defendant's Counterclaim is granted.
2. National Automobile Theft Bureau's Motion for Summary Judgment is granted.
3. The Motion of James M. Black, Barbara Black and R. LaMar Guiver for Summary Judgment is granted.
4. Amica's Motion to Strike Affidavit in Opposition to its Motion to Dismiss is granted.
5. The Court reserves ruling on plaintiff's Motion for Sanction and Striking Defendant's Pleadings.

Counsel for the prevailing parties are to prepare the appropriate Orders in accordance with the Local Rules of Practice.

Dated this 30 day of September, 1986.

15/ Richard Moffat  
RICHARD H. MOFFAT  
DISTRICT COURT JUDGE

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Memorandum Decision, postage prepaid, to the following, this \_\_\_\_\_ day of September, 1986:

Henry E. Heath  
S. Baird Morgan  
Mark J. Taylor  
Attorneys for Plaintiff  
Sixth Floor Boston Building  
Salt Lake City, Utah 84111

Edward Flint  
Attorney for Defendant Carl F. Schettler  
3105 Plateau Drive  
Salt Lake City, Utah 84109

Phil L. Hansen  
Co-counsel for Carl F. Schettler  
800 Boston Building  
Salt Lake City, Utah 84111

Robert R. Wallace  
Attorney for Defendants Black, Nichols & Guiver  
175 S. West Temple, Suite 650  
Salt Lake City, Utah 84101

Wesley M. Lang  
Attorney for Third Party Defendant  
National Automobile Theft Bureau  
136 S. Main, Suite 900  
Salt Lake City, Utah 84101

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HENRY E. HEATH, 1441  
S. BAIRD MORGAN, 2314  
MARK J. TAYLOR, 4455  
STRONG & HANNI  
Attorneys for Plaintiff  
Sixth Floor Boston Building  
Salt Lake City, Utah 84111  
Telephone: (801) 532-7080

H. Dixon Hindley, Clerk 3rd Dist. Court  
By K. Grotz  
Deputy Clerk

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IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY  
STATE OF UTAH

---

AMICA MUTUAL INSURANCE,  
Plaintiff,

vs.

CARL F. SCHETTLER,  
Defendant.

SUMMARY JUDGMENT  
AND ORDER

---

CARL F. SCHETTLER,  
Third-Party  
Plaintiff,

vs.

JAMES M. BLACK and BARBARA  
BLACK, dba BLACK, NICHOLS &  
GUIVER, and R. LAMAR GUIVER,  
and NATIONAL AUTOMOBILE  
THEFT BUREAU,

Third-Party  
Defendants.

Civil No. C85-2687

Judge Richard Moffat

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WHEREAS, on August 19, 1986, before the Honorable Richard  
H. Moffat, District Court Judge of the above-entitled court, the  
following motions having come for hearing:

1. Plaintiff AMICA Mutual Insurance Company's Motion for

Summary Judgment;

2. Plaintiff AMICA Mutual Insurance Company's Motion to Strike Pleadings;

3. Plaintiff AMICA Mutual Insurance Company's Motion to Strike Affidavits in Opposition;

4. Third-party defendant National Automobile Theft Bureau's Motion for Summary Judgment;

5. Third-party defendants James Black, Barbara Black, dba Black, Nichols & Guiver's and R. LaMar Guiver's Motion for Summary Judgment.

AND WHEREAS, the following parties and counsel being present:

1. Henry E. Heath, S. Baird Morgan and Mark J. Taylor, attorneys for plaintiff and third-party defendant AMICA Mutual Insurance Company;

2. Robert Wallace, attorney for James Black, Barbara Black, dba Black, Nichols & Guiver, and R. LaMar Guiver, third-party defendants.

3. Jay Jensen and Wesley Lang attorneys for National Automobile Theft Bureau, third-party defendant;

4. Phil Hansen and Ed Flint attorneys and Carl Schettler personally, for and on behalf of defendant and third-party plaintiff Carl F. Schettler.

AND WHEREAS, the court having heard argument from counsel with regard to the above-described motions and having reviewed the memoranda, affidavits, depositions and other pleadings of record;

AND WHEREAS, the defendant and third-party plaintiff, by and through counsel of record having stipulated in open court that the cause of action based on conversion be dismissed and also that all third-party claims against third-party defendant Barbara Black be dismissed and this court having previously so ordered;

AND WHEREAS, the court expressly finding, pursuant to Rule 54(b) of the Utah Rules of Civil Procedure, that there is no just reason for delay and that the dismissal of all claims of the counterclaim of defendant and third-party plaintiff shall be a final judgment;

AND WHEREAS, the court having provided additional time to defendant and third-party plaintiff to file additional points and authorities and affidavits in opposition to said motions and none having been filed, and the court being otherwise fully advised in the premises now enters its judgment and order as follows:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Motion for Summary Judgment of plaintiff and third-party defendant AMICA Mutual Insurance Company is hereby granted. The Motion for Summary Judgment of third-party defendant National Automobile Theft Bureau is hereby granted. The Motion for Summary Judgment of James Black, Barbara Black, dba Black, Nichols & Guiver and R. LaMar Guiver is hereby granted. AMICA Mutual Insurance Company's Motion to Strike Affidavits of Elizabeth B. Stewart, Reid W. Erritsen, Debra Ann Murdock, Lisa Hewiston, Lowell V. Summerhays, Redrick W. Green and Jim Hanson in opposition to its Motion for Summary Judgment is hereby granted. The Motion of AMICA Mutual

Insurance Company to Strike Defendant and Third-Party Plaintiff's Pleadings as Sanctions is hereby reserved for ruling at a later time.

DATED this 31<sup>st</sup> day of October, 1986.

BY THE COURT:

ATTEST  
H. DIXON HINDLEY  
CLERK  
By [Signature]  
RICHARD W. MOFFAT  
Third District Court Judge  
By R. Grotz  
Deputy Clerk

CERTIFICATE OF HAND-DELIVERY

HEREBY CERTIFY that a true and correct copy of the foregoing Summary Judgment and Order was hand-delivered this 22<sup>nd</sup> day of October, 1986, to the following:

Phil Hansen  
Attorneys for Carl F. Schettler  
#800 Boston Building  
Salt Lake City, Utah 84111

Robert Wallace  
HANSON, DUNN, EPPERSON & SMITH  
175 South West Temple, #650  
Salt Lake City, Utah 84101

Wesley Lang  
CHRISTENSEN, JENSEN & POWELL  
#900 Kearns Building  
Salt Lake City, Utah 84101

Caron Martinez



No judgment by default shall be entered against the State of Utah or against an officer or agency thereof unless the claimant establishes his claim or right to relief by evidence satisfactory to the court.

**RULE 56. SUMMARY JUDGMENT**

- (a) For Claimant.
- (b) For Defending Party.
- (c) Motion and Proceedings Thereon.
- (d) Case Not Fully Adjudicated on Motion.
- (e) Form of Affidavits; Further Testimony; Defense Required.
- (f) When Affidavits are Unavailable.
- (g) Affidavits Made in Bad Faith.

**(a) For Claimant.**

A party seeking to recover upon a claim, counterclaim or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of twenty days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

**(b) For Defending Party.**

A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought, may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

**(c) Motion and Proceedings Thereon.**

The motion shall be served at least ten days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

**(d) Case Not Fully Adjudicated on Motion.**

If on motion under this Rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

**(e) Form of Affidavits; Further Testimony; Defense Required.**

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be sup-

plemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this Rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this Rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

**(f) When Affidavits are Unavailable.**

Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

**(g) Affidavits Made in Bad Faith.**

Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this Rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

SUPREME COURT OF UTAH

AUG 12 1987

STATE OF UTAH

SALT LAKE CITY, UTAH

August 11, 1987

OFFICE OF THE CLERK

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Phil L. Hansen, Esq.  
Hansen & Hansen  
800 Boston Building  
#9 Exchange Place  
Salt Lake City, Utah 84111

Amica Mutual Insurance,  
Plaintiff and Respondent,  
v.

Carl F. Schettler,  
Defendant and Appellant,  
Carl F. Schettler,  
Third-Party Plaintiff  
and Appellant,  
v.

No. 860621

James M. Black and Barbara J. Black  
dba Black, Nichols & Guiver; R. LaMar  
Guiver; and National Automobile Theft  
Bureau,  
Third-Party Defendants  
and Respondents.

Respondent's motion to Dismiss Appeal is denied without prejudice to the issues raised therein being addressed in the following appeal from the final judgment. Counsel for the appellant is required to personally pay to counsel for for the respondent the sum of \$200.00 as and for attorney fees.

Geoffrey J. Butler, Clerk